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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

To: The Commission

PETITION FOR RECONSIDERATION

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February 20, 1997

SUMMARY

By this petition, BellSouth seeks reconsideration of the Commission's apparent decision to bar not only BOCs but also their affiliates from providing maintenance and installation services for both the telephone company and the interLATA company. Specifically, the Commission has interpreted the term "operate independently" in Section 272(b)(1) of the Communications Act to "prohibit a BOC *and its affiliates*, other than the section 272 affiliate itself, from providing operating, installation, or maintenance services associated with the facilities owned by the section 272 affiliate." BellSouth believes this restriction is contrary to the statute, is inefficient and unnecessary, and should be modified, at a minimum, to permit a BOC *affiliate* (other than the Section 272 affiliate) to perform installation and maintenance functions for both the telephone company and the long distance (interLATA) company.

BellSouth also believes that the Commission's definition of marketing and sale of service appears to be too restrictive and should be reconsidered or clarified to include product development and strategy. While the Commission's *Order* clearly exempts the actual sale of the product from the nondiscrimination provisions of Section 272(c), it appears to subject product development and strategy to the nondiscrimination requirement. This inclusion is clearly overbroad. The *Order* does not address the fact that such product development efforts and strategies will be required in order to determine the nature and extent of the services that a BOC will sell and market. Given that marketing and sale of service is exempt from the nondiscrimination requirement, it is illogical to subject product development and strategy with respect to the marketing and sale of service to a nondiscrimination requirement.

Finally, BellSouth seeks reconsideration of the requirement that BOCs must provide out-of-region interLATA information services through a separate affiliate. Although Section 272(a)(2)(B) requires a separate affiliate for the "origination of interLATA telecommunications services," it specifically exempts from that requirement "out-of-region services described in section 271(b)(2)." Under Section 271(b)(2), BOCs can provide out-of-region interLATA services immediately upon the enactment of the Telecommunications Act of 1996. BellSouth demonstrates herein that out-of-region interLATA services encompasses out-of-region interLATA *information* services, such that the provision of such services is exempt from the separate affiliate requirement. Accordingly, BellSouth asks the Commission to reconsider its decision to require BOCs to provide out-of-region interLATA information services through a separate affiliate.

TABLE OF CONTENTS

SUMMARY i

TABLE OF CONTENTS ii

DISCUSSION 1

I. BOC AFFILIATES SHOULD BE PERMITTED TO PROVIDE MAINTENANCE AND INSTALLATION SERVICES FOR BOTH THE TELEPHONE COMPANY AND THE INTERLATA COMPANY 1

A. Section 272(b) Structural Separation Requirements 2

B. "Operate Independently" 4

C. Loss of Efficiency and Economies of Scope 7

II. THE DEFINITION OF MARKETING AND SALE OF SERVICE SHOULD INCLUDE PRODUCT DEVELOPMENT AND STRATEGY 7

III. THE STATUTE DOES NOT REQUIRE BOCS TO PROVIDE OUT-OF-REGION INTERLATA INFORMATION SERVICES THROUGH A SEPARATE AFFILIATE 10

CONCLUSION 13

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To: The Commission

PETITION FOR RECONSIDERATION

BellSouth Corporation ("BellSouth"), on behalf of its subsidiaries and affiliates, hereby petitions the Commission for reconsideration of its *First Report and Order* in CC Docket No. 96-149, FCC 96-489 (released December 24, 1996), *summarized*, 62 Fed. Reg. 2,927 (January 21, 1997) ("*Order*"), *recon. in part*, FCC 97-52 (released February 19, 1997). BellSouth seeks reconsideration of the Commission's apparent decision to bar not only Bell Operating Companies ("BOCs") but also their affiliates from providing maintenance and installation services for both the telephone company and the interLATA company. BellSouth also believes that the Commission's definition of marketing and sale of service appears to be too restrictive and should be reconsidered or clarified to include product development and strategy. Finally, BellSouth seeks reconsideration of the requirement that BOCs must provide out-of-region interLATA information services through a separate affiliate.

DISCUSSION

I. BOC AFFILIATES SHOULD BE PERMITTED TO PROVIDE MAINTENANCE AND INSTALLATION SERVICES FOR BOTH THE TELEPHONE COMPANY AND THE INTERLATA COMPANY

The *Order* does not allow a BOC to provide maintenance and installation services to the Section 272 affiliate with respect to the affiliate's interexchange services. Likewise, the *Order* bars the Section 272 affiliate from performing maintenance and installation functions for the BOC. The

Order goes even further, however, in apparently also prohibiting the establishment of an affiliate that would provide installation and maintenance functions to both the BOC and the Section 272 affiliate.

Specifically, the Commission has interpreted the term "operate independently" in Section 272(b)(1) of the Communications Act to "prohibit a BOC *and its affiliates,* other than the section 272 affiliate itself, from providing operating, installation, and maintenance services associated with the facilities owned by the section 272 affiliate."[1] Similarly, the Commission stated that a Section 272 affiliate may not provide such services associated with the BOC's facilities.[2] BellSouth believes this restriction is contrary to the statute, is inefficient and unnecessary, and should be modified, at a minimum, to permit a BOC *affiliate* (other than the Section 272 affiliate) to perform installation and maintenance functions for both the telephone company and the long distance (interLATA) company.

A. Section 272(b) Structural Separation Requirements

Section 272(b) sets forth in detail what requirements are to be placed on the separate affiliate. In fact, the structural separation requirements of Section 272(b) are comparable in their level of detail to the rules the FCC has previously adopted to govern *Computer II* or cellular structural affiliates.[3] The fact that Congress set forth such details instead of expressly leaving the details for the Commission to complete demonstrates that the structural separation requirements of Section

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1 *Order* at ¶ 15 (emphasis added); *see id.* at ¶ 163.

2 *Order* at ¶ 15; *see id.* at ¶ 163.

3 *Compare* 47 U.S.C. § 272(b)(1)-(5) with 47 C.F.R. §§ 22.903(b)-(g) (cellular), 64.702(c)(1)-(5) (*Computer II*).

272(b) are complete unto themselves.[4] Unlike Section 273, which specifically confers authority on the Commission to supplement the statutory structural separation scheme with additional structural regulations,[5] Section 272 does not give the Commission the ability to adopt substantive structural separation rules.

Given this fact, the Commission lacked authority to promulgate substantive legislative rules (other than accounting rules) to implement the structural separation requirements of Section 272(b). The Commission did not have the discretion, in "implementing" Section 272, to add to the detailed statutory scheme established by Congress.[6] Thus, a given BOC affiliate either is in compliance with Section 272(b) or it is not. If it complies with Section 272(b), the affiliate satisfies the requirements of Section 272(a). Commission regulations cannot change the plain terms of the statute, and the statute does not place any limits on the use of a BOC affiliate for the provision of installation and maintenance services to both the BOC and its Section 272 affiliate.

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[4] *See American Petroleum Institute v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060-61 (D.C. Cir. 1995). In contrast, new Section 10 of the Communications Act was added to authorize the Commission to *forbear* from enforcing provisions of the Act in certain circumstances. *See* 47 U.S.C. § 160.

[5] Section 273(g) expressly grants the Commission authority to "prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of this section and otherwise to prevent discrimination and cross-subsidization" with respect to the manufacturing affiliate.

[6] *See American Petroleum Institute*, 52 F.3d at 1119-20; *see also MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223, 2231 (1994); *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520-21 (D.C. Cir. 1995); *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186, 1195 (D.C. Cir. 1985); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (per curiam) (holding that an agency must adhere to the procedures established by Congress and is without authority "to replace the statutory scheme with a . . . procedure of its own invention").

B. "Operate Independently"

Under Section 272(b)(1), a BOC interLATA affiliate is required to "operate independently" from the BOC. This language is identical to the language in the *Computer II* and cellular rules,[7] and does not contain "gaps" to be filled through implementing regulations. Accordingly, no rules were needed to explain the meaning of this provision.

Moreover, this language does not constitute an invitation to the Commission to engage in structural regulation beyond what Congress has done in the remainder of Section 272(b). If Congress had intended to grant the FCC authority to prescribe regulation, it would have done so explicitly, as it did in Section 273. The Commission went beyond the intended scope of Section 272(b) when it concluded that "the 'operate independently' requirement of section 272(b)(1) *imposes requirements beyond those listed in sections 272(b)(2)-(5).*"[8] Therefore, the Commission must reconsider this conclusion.

In interpreting the "operate independently" requirement, the Commission compared Section 274(b) with Section 272(b). The Commission notes that Section 274(b) mandates that a separated affiliate or electronic publishing joint venture be "operated independently," and then lists nine specific requirements, unlike Section 272(b). Based on this, the Commission concludes that differences in the two sections "suggest that the term 'operate independently' in section 272(b)(1) should not be interpreted to impose the same obligations on a BOC as section 274(b)."[9]

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[7] *See* 47 C.F.R. §§ 22.903(b) ("Separate corporations must operate independently in the provision of cellular service."), 64.702(c)(2) ("Each such separate corporation shall operate independently in the furnishing of enhanced services and customer-premises equipment.").

[8] *Order* at ¶ 156.

[9] *Id.* at ¶ 157.

BellSouth submits that under well-settled principles of statutory construction, the fact that Congress found it necessary to impose restrictions in Section 274 on particular activities, such as installation and maintenance, indicates that those activities were not already prohibited by the requirement of independent operation either in Section 274 — or in Section 272 enacted by the same Congress in the same Act. Thus, the absence of those same activities from the listing of specific restrictions in Section 272 indicates that Congress did not restrict those activities in the case of the Section 272 affiliate.

Given the stark difference between Sections 272 and 274 with respect to installation and maintenance, the only rational construction of Section 272 is that Congress did not intend to restrict BOCs from installing and maintaining equipment for the Section 272 affiliate. Under the doctrine of *expressio unius est exclusio alterius*, the fact that Congress included certain items in a list means that it intended to exclude all other items not listed.[10] Even if the "operate independently" language did, *arguendo*, give the Commission some discretion to impose additional restrictions, it does not give the Commission authority to impose terms of which Congress was aware and decided not to include. Thus, the restrictions imposed by Section 274 that are absent from Section 272, including BOC performance of installation and maintenance, cannot be applied to the relationship between the BOC and its Section 272 affiliate through "interpretation" of the independent operation requirement.

The Commission compounded its erroneous construction of the statute when it barred not only the BOC but also any BOC *affiliate* from providing installation and maintenance services to the Section 272 affiliate. Section 272(b)(1) addresses the relationship of the Section 272 affiliate with respect to the BOC, not other affiliated companies. It states, in its entirety: "The separate

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[10] *See* 2A Norman J. Singer, Statutes and Statutory Construction § 47.23 (5th ed. 1992).

affiliate . . . shall operate independently from the Bell operating company." It does not in any way purport to govern the relationship of the Section 272 affiliate with other affiliated companies.

In this respect, Section 272(b)(1) is essentially identical to other provisions, such as Section 272(b)(3), which place restrictions on the relationship of the separate affiliate with the BOC, not the parent or other affiliates.[11] In construing Section 272(b)(3), the Commission correctly concluded that this section "extends only to the relationship between a BOC and its section 272 affiliate" and does *not* bar the parent company or "an affiliate of the BOC, such as a services affiliate," from "provid[ing] services to both a BOC and a section 272 affiliate."[12] Section 272(b)(1) is identical in extent to Section 272(b)(3) in that it governs only the relationship of the Section 272 affiliate and the BOC. Where Congress intended to regulate the relationship of a separate affiliate with its parent or other affiliated companies, it expressly did so.[13] There is no requirement that the Section 272 affiliate "operate independently" of its parent or other affiliated companies, with respect to equipment installation and maintenance or anything else.

Because Section 272(b)(1) requires only that the Section 272 affiliate operate independently of the BOC, and is as unambiguous in this respect as Section 272(b)(3), the Commission erred when it held that this section bars the Section 272 affiliate from obtaining installation and maintenance from any affiliate of a BOC, whether or not that affiliate also provides installation and maintenance to the BOC. Under the plain language of the statute there is no restriction on provision of installation and maintenance to the Section 272 affiliate at all, even by the BOC. But if, as the Commission believes, the "operate independently" requirement imposes such a restriction on the

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[11] Section 272(b)(3), for example, states that the separate affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate."

[12] *Order* at ¶ 182.

[13] *See, e.g.*, 47 U.S.C. § 274(c)(2)(A).

provision of such services by the BOC, there can be no such restriction on the provision of such services by an *affiliate* of the BOC, because the independent operation requirement does not extend to affiliates. Accordingly, the Commission's *Order* should be reconsidered.

C. Loss of Efficiency and Economies of Scope

Finally, the Commission states that Section 272(b)(1) "does not preclude a BOC or a section 272 affiliate from providing telecommunications services to one another, so long as each entity performs itself, or obtains from an unaffiliated third party, the operating, installation, and maintenance functions associated with the facilities that it owns or leases from an entity unaffiliated with the BOC."[14] The Commission states these requirements are necessary to "prevent a BOC from integrating its local exchange and exchange access operations with its section 272 affiliate's activities to such an extent that the affiliate could not reasonably be found to be operating independently, as required by the statute."[15] BellSouth submits that simply allowing a BOC affiliate to provide maintenance and installation services for the telephone company and the interLATA company will not lead to integration of operations. Accordingly, BellSouth agrees with those comments in the proceeding below that the imposition of additional structural separation requirements, particularly regarding installation and maintenance activities, would result in a loss of efficiency and economies of scope.[16]

II. THE DEFINITION OF MARKETING AND SALE OF SERVICE SHOULD INCLUDE PRODUCT DEVELOPMENT AND STRATEGY

BellSouth also seeks reconsideration of the precise issues included in the definition of "marketing and sale of services" under Section 272(g) for purposes of determining whether the

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[14] *Order* at ¶ 164.

[15] *Id.* at ¶ 158.

[16] *See, e.g.*, SBC Communications Inc. Comments at 13-17; USTA Reply Comments at 4.

nondiscrimination provisions of Section 272(c) apply. Specifically, the *Order* treats product development and strategy and actual sale of the product separately for purposes of nondiscrimination. The Commission clearly exempts only the actual sale of the product from the nondiscrimination provisions of Section 272(c), while it appears to subject product development and strategy to the nondiscrimination requirement. BellSouth seeks clarification, or if necessary reconsideration, to ensure that product development and strategy that is part of the marketing and sale of service is not subject to the nondiscrimination requirement.

Specifically, the Commission's *Order* stated that activities such as customer inquiries, sales functions, and ordering "appear to involve only the marketing and sale of a Section 272 affiliate's services, as permitted by Section 272(g)," and thus are not subject to the nondiscrimination obligations.[17] These activities relate to the actual sale of the product, and BellSouth agrees with the Commission's conclusion in this regard. However, the Commission also found that activities which "may involve BOC participation in the planning, design, and development of a section 272 affiliate's offerings" regarding product development and strategy were beyond the scope of Section 272(g)'s authorization of joint marketing and sale, and would thus be subject to Section 272(c)'s nondiscrimination requirements.[18]

The exclusion of all planning, design and development efforts concerning product development and strategy from the scope of Section 272(g) is clearly overbroad. The Commission appears not to have considered the fact that such efforts will be required in order to determine the nature and extent of the services that a BOC will sell and market. The BOC will need to engage in planning and provisioning for such marketing programs and determine the particular services it

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17 *Order* at ¶ 296.

18 *Id.*

wishes to sell. Given that the actual sale and marketing of the affiliate's service is permitted and is not subject to a nondiscrimination requirement, the BOC has no corresponding duty to market and sell the services of other interexchange carriers ("IXCs"). Thus, there is no requirement that a BOC offer to jointly market and sell the services of any IXC other than its Section 272 affiliate.

The Commission reads "joint marketing and sales" as a singular activity. However, the term "marketing" is much broader than the term "sales," which is a subset of "marketing." "Sale" is the transfer of ownership from one person to another.[19] "Marketing" includes a wide range of functions other than "sales."[20] Virtually any modern marketing text would include product planning, design and development within the parameters of the term "marketing."

BellSouth submits that Congress intended to allow the BOCs the same freedom to develop, design and market local and interLATA products as their competitors have.[21] Although the Commission's interpretation nominally allows BOCs to do this, the Commission has effectively created a new and disparate obligation on BOCs to develop and design their competitors' interLATA services as well, by excluding product development and strategy from joint marketing. This is contrary to the intent of Congress,[22] and is inappropriate in any event in a competitive marketplace.

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[19] Webster's Third New International Dictionary (Unabridged) defines "sale" as "a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)" (Merriam-Webster, 1986).

[20] Webster's Third New International Dictionary (Unabridged) includes the following definition of "marketing:" "an aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information" (Merriam-Webster, 1986).

[21] For example, in the marketing provisions of Section 272(g) and 271(e), Congress sought to establish parity among the BOCs and the major IXCs with respect to their ability to offer one-stop shopping. S. Rep. No. 23, 104th Cong., 1st Sess. 23, 43 (1995) ("Senate Report").

[22] *See* Senate Report at 43.

The Commission should give the term "joint marketing" its natural meaning to include product development and strategy.

III. THE STATUTE DOES NOT REQUIRE BOCS TO PROVIDE OUT-OF-REGION INTERLATA INFORMATION SERVICES THROUGH A SEPARATE AFFILIATE

Section 272(a)(2)(B) requires a separate affiliate for the "origination of interLATA telecommunications services," but specifically exempts from that requirement "out-of-region services described in section 271(b)(2)."[23] Under Section 271(b)(2), BOCs can provide out-of-region interLATA services immediately upon the enactment of the Telecommunications Act of 1996. As shown below, BellSouth submits out-of-region interLATA services encompasses out-of-region interLATA *information* services, such that the provision of such services is exempt from the separate affiliate requirement, pursuant to Sections 271(b)(2) and 272(a)(2)(B)(ii).

Although there is nothing in the statute or the conference agreement which purports to narrow the scope of what is included in out-of-region interLATA services for purposes of Section 271(b)(2), the Commission concluded in its *Order* that the exemption in Section 272(a)(2)(B)(ii) extends only to out-of-region interLATA services that are telecommunications services.[24] Because Section 272(a)(2)(C) requires a separate affiliate for "interLATA information services," the Commission adopted its tentative conclusion that BOCs must provide interLATA information services through a separate affiliate "regardless of whether these services are provided in-region or out-of-region,"[25] even though the statute itself contains no such restriction. The Commission based its conclusion upon the fact that Section 272(a)(2)(B)(ii) explicitly excludes out-of-region services,

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23 47 U.S.C. § 272(a)(2)(B)(ii).

24 *Order* at ¶ 86.

25 *NPRM* at ¶ 41; *see Order* at ¶¶ 82, 85.

while Section 272(a)(2)(C) does not, suggesting that Congress intended not to exclude the latter from the separate affiliate requirement.[26]

As shown in its comments,[27] BellSouth disagrees with this analysis. BellSouth believes that the statute clearly exempts out-of-region interLATA information services from the separate affiliate requirement under Section 272(a)(2)(B)(ii), while it subjects other such services to the requirement when provided in-region under Section 272(a)(2)(C). Accordingly, BellSouth disagrees with the conclusion that the exception in Section 272(a)(2)(B)(ii) "extends only to out-of-region interLATA services that are telecommunications services."[28] What Section 272(a)(2)(B)(ii) says, by contrast, is that all out-of-region services described in Section 271(b)(2) are exempted from the separate affiliate requirement otherwise imposed upon the origination of interLATA telecommunications services.[29]

Under Section 271(b)(2), out-of-region services are defined as "interLATA services originating outside [a BOC's] in-region States."[30] Thus, the question is whether the term "interLATA services" encompasses the provision of "interLATA information services," for if it does, out-of-region information services are clearly excluded under Section 272(a)(2)(B)(ii).

The statute's definitions for the relevant terms confirm that certain information services provided on an interLATA basis are "interLATA services" and are, accordingly, subject to different treatment in- and out-of-region. The statute does not specifically define "interLATA information

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26 *Order* at ¶ 86.

27 *See* BellSouth Comments at 20, 21-23.

28 *Order* at ¶ 86.

29 47 U.S.C. § 272(a)(2)(B)(ii).

30 47 U.S.C. § 271(b)(2).

service" or "interLATA telecommunications service," but it does define "interLATA service," "telecommunications," "information service," and "telecommunications service." Specifically:

- "The term 'interLATA service' means telecommunications between a point located in a [LATA] and a point located outside such area."[31]
- "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[32]
- "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public . . . ."[33]
- "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[34]

Notably, the definition of "interLATA service" does not encompass just "telecommunications *service*" but applies instead to "telecommunications" across LATA boundaries. One of the key components of an "information service" is that it involves the manipulation of information "via telecommunications." Thus, an "interLATA information service" is an "information service" that also constitutes an "interLATA service" because it is provided via interLATA "telecommunications." By reading together the definitions of "interLATA service," "telecommunications," and "information service," the following definition of an "interLATA information service" ensues:

> The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via the transmission, between a point, specified by a user, located in a LATA and a point, also specified by the user, located outside such LATA, of information of the user's

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31 47 U.S.C. § 153(42).

32 47 U.S.C. § 153(48).

33 47 U.S.C. § 153(51).

34 47 U.S.C. § 153(41).

choosing, without change in the form or content of the information as sent and received.[35]

Because, under this definition, interLATA information services clearly fall within the definition of interLATA services, the out-of-region provision of all such services is exempt from the separate affiliate requirement, pursuant to Sections 271(b)(2) and 272(a)(2)(B)(ii). Accordingly, BellSouth asks the Commission to reconsider its decision to require BOCs to provide out-of-region interLATA information services through a separate affiliate.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission reconsider those aspects of its *Order* addressed herein.

Respectfully submitted,

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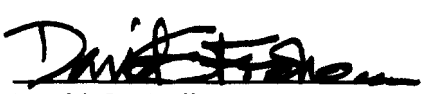
By: 

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[35] *See* BellSouth Comments at 23.

CERTIFICATE OF SERVICE

I, Phyllis Martin, hereby certify that copies of the foregoing "Petition for Reconsideration" in CC Docket No. 96-149 were served via hand delivery, this 20th day of February, 1997, to the persons listed below:

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